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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yuba)

THE PEOPLE,

Plaintiff and Respondent,

v.

JARRETT WAYNE REYNOLDS,

Defendant and Appellant.

C061058

(Super.Ct.No.
CRF060000706)

Defendant Jarrett Wayne Reynolds violated a restraining order and threatened to kill his ex-wife. He then threatened to kill an investigating police officer. Appearing to be intoxicated, defendant also asked to speak with his daughter. He was charged with making criminal threats, threatening a police officer, and stalking.

Defendant entered a negotiated plea of guilty to making criminal threats to his ex-wife (Pen. Code, § 422). In accordance with the plea agreement, the imposition of judgment was suspended and he was placed on probation. Among the conditions of probation are defendant serve 365 days in jail, have "no contact" with his ex-wife and his

daughter, and "remain 100 yards from their person, residence, place of employment and school." If, however, defendant completes "batterers' treatment and anger management programs," he "may seek visitation with his daughter only as outlined in a family law order rendered subsequent to the anger and batterers' treatment completion dates."

In addition to the no contact condition of probation, the trial court issued a "CRIMINAL PROTECTIVE ORDER -- DOMESTIC VIOLENCE" (Pen. Code, § 1203.097) that precludes defendant from having any "personal, electronic, telephonic, or written contact" with his ex-wife and daughter and from being within 100 yards of them, except for the "safe exchange of children for visitation as stated in a Family, Juvenile, or Probate court order issued after the date [of the protective order]."

At sentencing, defendant did not object to the condition of probation that he have no contact with his daughter.¹ Nevertheless, he appeals, claiming (1) that condition of probation is arbitrary, unreasonable, and a violation of his constitutional rights as a parent, and (2) the separate protective order is unauthorized to the extent that it precludes him from contacting his daughter.

We will uphold the no contact condition of probation. However, because a criminal protective order issued pursuant to Penal Code section 1203.097 is limited to direct victims of a defendant's crime,

¹ His counsel asked only that, upon successful completion of the required counseling programs, defendant should be able to seek reunification with his daughter by obtaining such an order from either the family court *or the sentencing court*.

and defendant's daughter was not such a victim, we will strike the portion of the separate criminal protective order that includes his daughter.

DISCUSSION

I

As we will explain, defendant's challenge to the no contact condition of his probation is forfeited because he failed to raise the challenge in the sentencing court.

Ordinarily, "a criminal defendant who does not challenge an assertedly erroneous ruling of the trial court in that court has forfeited his or her right to raise the claim on appeal." (*In re Sheena K.* (2007) 40 Cal.4th 875, 880.) This forfeiture rule applies "to a claim that probation conditions are unreasonable, when the defendant fails to object on that ground in the trial court." (*Id.* at p. 882.) If, however, a condition of probation is *facially* unconstitutional, it can be challenged for the first time on appeal. (*Id.* at pp. 885-888.) But if the condition is not unconstitutional on its face (i.e., the alleged defect does "not present "pure questions of law that can be resolved without reference to the particular sentencing record developed in the trial court" [citation]'), the forfeiture rule may apply when the defendant did not object to the condition at sentencing. (*Id.* at p. 889.)

Here, the propriety of the no-contact-with-daughter condition of probation would depend on a development of the factual record in the sentencing court. This is so since defendant's claim is that the condition is arbitrary, unreasonable, and a violation of his parental

rights because (1) his daughter "was not a victim of [his] criminal threat offense," (2) his criminal act "was not imminently dangerous in that it consisted of threats related during a telephone call from a separate state, and in no manner targeted the child," and (3) "there is nothing to indicate that [defendant] has ever posed a threat to his child[.]"

Had defendant raised the objections at sentencing, the People could have presented evidence justifying the no contact order with respect to defendant's daughter. Indeed, the existing record shows there was reason to be concerned for the child's safety. Defendant's ex-wife, the child's mother, was fearful of defendant, and that fear included fears for her daughter. Defendant had a significant history of domestic violence, much of which was related to alcohol problems. After threatening to kill both his ex-wife and a police officer, the apparently intoxicated defendant sought to speak with his daughter. The ex-wife was afraid that defendant would retaliate. She was specifically afraid he would harm the child. The ex-wife also wanted there to be no contact between defendant and the child.

Because of these facts, defendant has failed to demonstrate the no contact condition of probation at issue on appeal is facially unconstitutional. Therefore, his failure to object to the condition at sentencing bars him from challenging it on appeal. Stated another way, this is precisely the sort of case in which applying the forfeiture rule "is appropriate, because characteristically the trial court is in a considerably better position than the Court of Appeal to review and modify a sentence option or probation condition

that is premised upon the facts and circumstances of the individual case.” (*In re Sheena K.*, *supra*, 40 Cal.4th at p. 885.)

II

Defendant also contends the separate, criminal protective order that prohibits him contacting his daughter is unauthorized because, by statute, such an order can apply only to a victim of the crime of which defendant was convicted, and his daughter was not a victim of that crime.

The People concede the order could not be issued pursuant to Penal Code section 1203.097, which states in pertinent part: “If a person is granted probation for a crime [of domestic violence], the terms of probation shall include” a “criminal court protective order protecting the *victim* from further acts of violence, threats, stalking, sexual abuse, and harassment, and, if appropriate, containing residence exclusion or stay-away conditions.” (Pen. Code, § 1203.097, subd. (a)(2), italics added; further section references are to the Penal Code.)

The People contend, however, that the criminal protective order could issue pursuant to section 136.2, which states in part: “[U]pon a good cause belief that harm to, or intimidation or dissuasion of, a victim or witness has occurred or is reasonably likely to occur, any court with jurisdiction over a criminal matter may issue orders including [prohibiting the defendant from having any contact with the victim or family members].” (§ 136.2, subd. (a)(1).) Thus, the People urge us to remand the matter to allow the trial court to issue the protective order pursuant to section 136.2.

The People fail to note this court's decision in *People v. Selga* (2008) 162 Cal.App.4th 113, which observed that "the only purpose of orders under section 136.2 'is to protect victims and witnesses in connection with the criminal proceeding in which the restraining order is issued in order to allow participation without fear of reprisal,' the duration of such an order 'is limited by the purposes it seeks to accomplish in the criminal proceeding.' [Citation.] That is, the protective orders issued under section 136.2 [are] operative only during the pendency of the criminal proceedings and as prejudgment orders. [Citation.]" (*Id. at pp. 118-119.*)

Because the provisions of section 1203.097 do not apply to defendant's daughter, the trial court's inclusion of the daughter in the protective order was error.

DISPOSITION

That portion of the "CRIMINAL PROTECTIVE ORDER -- DOMESTIC VIOLENCE," imposed pursuant to section 1203.097, that prohibits defendant from having any contact with his daughter is stricken, and the trial court is directed to so amend the order. As modified, the judgment is affirmed, including the condition of probation that defendant shall have "no contact" with his daughter and "remain

100 yards from [her] person, residence, place of employment
and school."

SCOTLAND, P. J.

We concur:

HULL, J.

CANTIL-SAKAUYE, J.